

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

Elon University,

Employer,

and

Case 10-RC-231745

Service Employees International Union
Workers United Southern Region,

Petitioner.

PETITIONER'S BRIEF ON REVIEW

Narendra K. Ghosh
Trisha S. Pande
PATTERSON HARKAVY LLP
100 Europa Dr., Ste. 420
Chapel Hill, NC 27517
(919) 942-5200
nghosh@pathlaw.com
tpande@pathlaw.com

*Counsel for Petitioner,
Service Employees International Union
Workers United Southern Region*

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Petitioner, Service Employees International Union Workers United Southern Region (the “Union”), submits this brief pursuant to Section 102.67(h) of the Board’s Rules and Regulations in support of Acting Regional Director John Doyle’s conclusion that the petitioned-for faculty at Elon University (“Elon”) are not managerial employees.

The petitioned-for part-time and limited-term faculty—collectively referred to as “temporary faculty”—do not have any input or control over university decision-making under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), *Pacific Lutheran University*, 361 NLRB 1404 (2014), or *University of Southern California v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019). With a single exception, there are no temporary faculty on any of Elon’s shared governance structures. Apart from a single seat, temporary faculty are prohibited from serving on university committees under Elon’s Bylaws. And the contingent employment relationship held by temporary faculty—marked by short-term contracts and minimal institutional support—makes their meaningful participation in university decision-making practically impossible. Because the petitioned-for faculty are categorically excluded from participating in Elon’s system of shared governance, they

are clearly not managerial employees. Accordingly, the Union respectfully requests that the Board uphold the Union's certification of representation.

PROCEDURAL HISTORY

On November 29, 2018, Elon's non-tenure-track undergraduate faculty filed a representation petition to hold an election with the Union. Elon objected to the petition, claiming that all petitioned-for faculty were "managerial" employees and that the proposed bargaining unit was inappropriate. A hearing was held on December 7, 12, 13, and 14, 2018.

On February 5, 2019, the Acting Regional Director ("ARD") issued a Decision and Direction of Election ("DDE"), finding in favor of the Union on all disputed issues. A mail ballot election was ordered in the following unit:

Including: All limited term, visiting, and adjunct faculty employees at Elon University teaching at least one credit-bearing undergraduate course in the Employer's College of Arts and Science, School of Communications, School of Education, or Martha & Spencer Love School of Business.

Excluding: All other employees, all tenured and tenure-track faculty, all continuing track faculty, all lecturing track faculty, all employees teaching online courses only, staff with faculty rank, all administrators (including those with teaching assignments), managers, and supervisors as defined by the Act.

This unit is composed of three classes of employees: (1) "part-time" or adjunct faculty;¹ (2) limited-term faculty; and (3) visiting faculty. (Faculty classifications are discussed in detail in Facts Section II, *infra*.) At the hearing, the Employer's list of then-current petitioned-for faculty included 135 adjunct faculty, 44 limited-term faculty, and 2 visiting faculty. (Employer Exhibit ("Er. Ex.") 18; Transcript ("Tr.") 144-50.)² Unless otherwise specified, this brief

¹ The terms "part-time" faculty and "adjunct" faculty are used interchangeably in this brief.

² References to the transcript and exhibits are for those from the initial December 2018 hearing.

addresses the part-time and limited-term faculty, collectively referred to by Elon as “temporary faculty.” Faculty excluded from the bargaining unit will be referred to as “permanent faculty.”

Ballots were mailed to voters on February 19, 2019, and counted on March 12, 2019. From the 283 eligible voters, 112 votes were cast for the Union and only 68 against. On March 19, 2019, Elon submitted six objections to the election. A hearing was held on April 2, 2019. At the hearing, Elon withdrew its second objection. On May 13, 2019, the Hearing Officer recommended that all objections be overruled. Elon filed exceptions to the Hearing Officer’s Report. On September 3, 2019, the ARD rejected each of Elon’s objections and exceptions in his Decision and Certificate of Representative.

On September 17, 2019, Elon filed a request for review of the ARD’s determinations regarding the managerial status of the petitioned-for faculty, the appropriateness of the bargaining unit, the voter eligibility formula, and three objections to the election. Elon later withdrew its request for review regarding its objections to the election.

On April 13, 2020, the Board granted Elon’s request for review only “with respect to the continued application of the Board’s ‘majority status rule’ as articulated in *Pacific Lutheran University*, 361 NLRB 1404 (2014).”

STATEMENT OF FACTS

I. The Administration of Elon University

Elon is a private university with its main campus located in Elon, North Carolina. (Tr. 32.) It is primarily an undergraduate institution with approximately 6,200 undergraduate students and 800 graduate students. (Id.) It is composed of six schools. (Tr. 31.) Four schools—the College of Arts and Science, School of Communication, School of Education, and Martha & Spencer Love School of Business—focus on undergraduate programs, though they

have a few graduate programs. (Id.) Two schools—the School of Health Sciences and School of Law—only provide graduate programs. (Tr. 197.)

“Elon University is governed by a self-perpetuating Board of Trustees consisting of 41 people[.]” (Er. Ex. 2, p. 9.) Beneath the Board of Trustees is an extensive administration beginning with the President of Elon, Dr. Connie Ledoux Book. (Tr. 32.) The President is “the chief officer of the corporation and the University, charged with the duty of administering the affairs of the corporation and the University under the authority, direction, and control of the Board of Trustees.” (Er. Ex. 2, p. 92.)

Provost and Executive Vice President, Dr. Steven House, reports to President Book. (Petitioner Exhibit (“Pet. Ex.”) 6, p. 3.) Provost House serves as the chief academic officer of the University and “is responsible for ensuring the academic quality of all departments, programs, and services within the academic affairs unit through the appropriation and allocation of necessary resources, through the oversight of hiring and evaluation activities, and through the establishment and coordination of policies and priorities.” (Er. Ex. 2, p. 82.)

Provost House “authorizes the creation and elimination of faculty and academic staff positions” and “retains ultimate responsibility over the management of budgets within academic affairs.” (Id.) The Provost also oversees admissions and development of Elon’s ten-year strategic plan for academic affairs, and reviews all academic policies to ensure that they are consistent with the University’s strategic plan and mission. (Id.; Tr. 33-34.) Several vice presidents and associate provosts report to the Provost. (Tr. 32-33; Pet. Ex. 6, p. 10; Er. Ex. 2, pp. 93-96.)

Also reporting to the Provost are the deans of each school within the University. (Tr. 32-33; Pet. Ex. 6, p. 10; Er. Ex. 2, pp. 93-96.) Deans make recommendations to the Provost

regarding salary, promotion, continuance, and tenure, and administer funds provided by the University. (Er. Ex. 2, p. 82.) Deans also oversee a host of administrators within their respective schools, including approximately 30 department chairs, who are charged with leading departments within each school. (Er. Ex. 2, p. 81.)

II. Faculty Classifications at Elon

Elon's Faculty Handbook describes all faculty classifications and applicable policies. (Er. Ex. 2.) It is interpreted and enforced by the Provost. (Tr. 48.) The Handbook distinguishes between "permanent" and "temporary" faculty. (Er. Ex. 1; Tr. 37.)

A. Permanent Faculty

Permanent faculty, also referred to as "full-time" faculty, include tenured, tenure-track, and some non-tenure-track faculty with longer term appointments such as continuing-track, lecturing-track, and visiting faculty. (Er. Ex. 1; Tr. 37.)

The hiring process for permanent faculty is coordinated by the Provost's office. (Tr. 154.) The process is initiated when a department chair makes a position request to his or her respective dean. (Er. Ex. 2, p. 84.) The dean then seeks authorization from the Provost to commence a national search for a permanent faculty. (Tr. 198; Er. Ex. 2, p. 84.) The Provost authorizes recruitment expenditures for the search. (Er. Ex. 2, p. 84.) The department chair then forms a search committee, which reviews and recommends candidates. (Er. Ex. 2, p. 84.) Both the department chair and dean conduct formal interviews with candidates. The dean approves the final selection of a candidate, which the dean then recommends to the Provost and President for final approval. (Tr. 199.)

All permanent faculty, with the exception of lecturers and visiting faculty, must have a terminal degree in their field. (Er. Ex. 1.) Permanent faculty have an expectation of continued

employment with the University, serving multiple-year appointments that will be renewed should the employee meet performance expectations. (Tr. 42-43.) They are obligated not only to teach, but also to conduct research and engage in service to the University. (Tr. 42-44.)

Permanent faculty undergo a rigorous review process that generally includes some or all of the following: an annual self-review; an annual chair review; a second year mid-point review; a third year mid-point review; a probationary mid-point review; a post-probationary review; and a student evaluation. (Er. Ex. 2, pp. 114-16, 119.) At a minimum, all permanent faculty undergo an annual self-review, also referred to as a “Unit I” level review. (Er. Ex. 2, p. 114; Tr. 205-06.)

All permanent faculty, except for “visiting” faculty, must complete probationary periods of several years at the initiation of their employment. (Er. Ex. 1; Er. Ex. 2, pp. 58-60.) They are then eligible for a promotion to a higher-ranking faculty classification, resulting in greater job protection. (Id.) For example, tenure-track faculty have to serve a probationary period of 4, 5, or 6 years, after which they may be granted tenure. (Er. Ex. 1; Tr. 43.) Continuing and lecture-track faculty have similar probationary periods and promotion steps. (Er. Ex. 1; Tr. 43-44.) All tenured, tenure-track, continuing-track, and lecturer-track faculty receive health insurance, 403(b) retirement benefits with matching contributions, course releases, sabbaticals, travel funds, and research and development funds. (Er. Ex. 1.)

Although Elon describes visiting faculty as “permanent,” they do not have rank or opportunity for promotion within their job classification. (Er. Ex. 1.) According to Provost House, visiting faculty appointments were created so that departments can “try on” a faculty member. (Tr. 45.) Visiting appointments are for one year, with the ability to renew up to six years, though there is no expectation of renewal. (Tr. 45; Er. Ex. 1.) There were only two visiting faculty teaching at Elon at the time of the hearing. (Er. Ex. 18.)

B. Temporary Faculty

Temporary faculty, by contrast, include “part-time” faculty—also referred to as adjunct faculty—and “limited-term” faculty. (Er. Ex. 1.) In stark contrast to the hiring process for permanent faculty, the part-time and limited-term faculty are typically found through a local or regional search. (Tr. 155, 198.) The Provost’s office does not review temporary appointments. (Tr. 198- 99.) Rather, the decision lies with the department chair, and in some cases, the dean. (Id.) No search committee is involved. (Tr. 198.)

Part-time faculty have semester-long contracts with no rank, no expectation of renewal, and no opportunities for promotion. (Er. Ex. 1.) Although they are all referred to as “part-time,” about 30 to 40 adjuncts teach a full-time load of 12 credit-hours per semester. (Tr. 36, 62.) Part-time faculty generally receive their contracts a few weeks before beginning teaching. (Tr. 50.) Adjunct appointments for the Spring 2019 semester had not been determined as of the date of the December 2018 hearing. (Tr. 197.)

Limited-term faculty have year-long contracts without expectation of promotion or renewal. (Tr. 47.) Limited-term appointments may only be renewed for up to four years. (Tr. 48, 192.) After four years, the limited-term position is terminated. (Id.) Elon typically hires part-time faculty to fill vacant limited-term positions. (Tr. 156, 200.) Like part-time faculty, limited-term faculty pick up extra classes to earn more money. (Tr. 47.)

Dr. Catherine Bush, a limited-term faculty member in the College of Arts and Sciences, testified that she did not understand her limited-term appointment to carry any service obligations. (Tr. 361, 372-73.) Dr. Bush was even prohibited from taking on more service and mentoring responsibilities because of her temporary status. (Tr. 381.) Similarly, adjunct Sharon Eisner from the Communications School testified that she volunteered to serve on committees at

her school but was rejected due to her adjunct status. (Tr. 401.) As discussed below, there is no evidence that any temporary faculty, with one exception on the Academic Council, served on any committee discussed in the record.

Both part-time and limited-term faculty are required to have at least a Master's degree in their respective fields based on SACS accreditation standards. (Tr. 166.) Limited-term, but not part-time faculty, may be eligible for travel funds at a dean's discretion. (Er. Ex. 1.) All part-time and limited-term faculty, in contrast to their full-time counterparts, are ineligible for any research and development funds, course releases, and sabbaticals. (Er. Ex. 1.) Also, unlike permanent faculty, part-time and limited-term faculty do not go through a formal evaluation process. (Tr. 207, 362; Er. Ex. 2, pp. 143-45.)

III. Elon's System of Shared Governance

The Faculty Bylaws afford the "Faculty" of the University a variety of specific powers "to be exercised subject to review by and approval of the President and the Board of Trustees." (Er. Ex. 2, p. 24; Tr. 54.) Any changes to the Bylaws must be approved by the Board of Trustees. (Tr. 54.)

The Bylaws define the "faculty" as consisting of "the teaching faculty, administrators with faculty ranks and staff with faculty rank." (Er. Ex. 2, p. 23.) "Teaching faculty" as defined by the Bylaws only includes permanent faculty. (Tr. 207.)³ Thus, the petitioned-for temporary faculty are not included within the "faculty of Elon University" under the Bylaws. (Tr. 207.)

³ "Teaching faculty status is limited to those whose performance assessment is linked to the completion of an annual Unit I [review]." (Er. Ex. 2, p. 10.) Provost House conceded that all teaching faculty must receive annual Unit I reviews. (Tr. 205-06; Er. Ex. 2, p. 10.) Part-time and limited-term faculty do not receive Unit I reviews. (Tr. 205-08; Er. Ex. 2, pp. 143-45.) Part-time and limited-term faculty are thus not "teaching faculty" and are subsequently not included within the "faculty of Elon University." (Tr. 207.)

Elon's "Academic Council" acts as a "coordinating committee of the Faculty[.]" (Er. Ex. 2, pp. 24-29.) The Council has 19 elected voting members that serve two-year terms, and three *ex officio* members: the President, the Provost, and the Chair of the University Curriculum Committee. (Er. Ex. 2, p. 24.) The Bylaws establish specific membership qualifications for each of the 19 elected seats. (Id.)

Permanent faculty members must occupy 18 out of the 19 Academic Council seats. (Er. Ex. 2, pp. 25-26.) The three at-large members of the Academic Council must hold the rank of Lecturer, Assistant Professor, Assistant Librarian or above. (Er. Ex. 2, p. 25). The 15 divisional members serving on the Council must hold the rank of Senior Lecturer, Associate Professor, or above. (Id.) All at-large and divisional members must have taught at Elon for at least two full academic years. (Id.) At the time of the petition filing, all but one of the elected members serving on the Academic Council hold the rank of Senior Lecturer or above; none are temporary faculty members. (Pet. Exs. 1, 5.)

Temporary faculty are prohibited from occupying all but one seat on the Academic Council. (Er. Ex. 2, p. 25.) The one part-time member of the Council must have taught at Elon for two contiguous semesters. (Id.) Since 2012, the part-time member on the Council has almost always been Billy Summers. (Pet. Ex. 1.) During the 2015-2017 term, another adjunct, Leigh Ann Whittle, was elected to serve on the Council but did not finish out her two-year term because she left the University. (Tr. 215-16; Pet. Ex. 1.) There is no evidence that a part-time member has ever spoken during an Academic Council meeting, or ever substantively participated in any of the body's deliberations.

Although they are not considered part of the "teaching faculty" of the University under the Bylaws, temporary faculty teaching more than 18 credit-hours in an academic year (all

limited-term and some part-time faculty) are separately permitted to vote for Academic Council members. (Er. Ex. 2, p. 23.) There is no evidence that any temporary faculty member has ever voted for an Academic Council member. To the contrary, Dr. Bush testified that she did not know the Academic Council existed until she became involved in the union campaign. (Tr. 376.)

In addition to the Academic Council, the Bylaws establish 14 “standing committees” involved with various components of university policy or campus life including the Curriculum Committee, Promotion and Tenure Committee, Academic Standing Committee, Core Curriculum Council, Faculty Research and Development Committee, Global Education Curriculum Committee, Graduate Council, Library Committee, Post-Probationary Faculty Development Review Committee, and Promotion and Tenure Committee. (Er. Ex. 2, pp. 31-46.) All standing committees have at least one administrator. (Er. Ex. 2, pp. 31-46.) Otherwise, membership is largely limited to “teaching faculty” or “faculty.” (Id.)

There are no temporary faculty serving on any of the standing committees discussed in the record. (Pet. Exs. 3, 5.) Because both limited-term and part-time faculty are not considered “teaching faculty” or “faculty” under the Bylaws of the University, they are not eligible to serve on any standing committees. (Tr. 205-06, 210; Er. Ex. 2, pp. 31-46.) Provost House acknowledged that it would be “tough” for temporary faculty to serve on any committees, even if permitted by the Bylaws, given the brevity of their contracts. (Tr. 103, 219.)

The University Curriculum Committee reviews curriculum proposals that come from various school-level curriculum committees—including separate curriculum committees for the Business, Communications, and Education Schools, and three separate curriculum committees within the College of Arts and Science. (Tr. 76-78, 219-20, 237-38.) There are no temporary faculty on the school-level curriculum committees. (Tr. 220; Pet. Ex. 3, pp. 8-11; Pet. Ex. 5.)

And temporary faculty are prohibited from serving on the University Curriculum Committee. (Tr. 219, 237.)

Once a major or minor is approved by the University Curriculum Committee, it is sent to the Academic Council, which is not required to vote on the change. (Tr. 238.) Similarly, a new major or minor will be discussed at a faculty meeting. (Tr. 238-39.) The faculty may or may not vote on the change. (Id.) In cases where a new major will incur significant costs, the Board of Trustees must give approval before the development of any curriculum. (Tr. 65.)

In addition to the standing committees, Provost House also described a Budget Committee that plays a central role in overseeing the University's budget. (Tr. 33.) The Budget Committee is chaired by the Provost, and composed of the Chief Financial Officer of Elon, the Assistant Vice President for Business, Finance, and Technology, a dean, and two fully tenured professors. (Tr. 122.) Temporary faculty cannot serve on the Budget Committee. (Tr. 33, 222.)

There is also a Strategic Planning Committee that works to develop a ten-year academic vision and plan for the University. (Tr. 126.) There are no temporary faculty on the Strategic Planning Committee. (Pet. Ex. 2.) The Long Range Planning Advisory Committee, chaired by the Provost, is charged with implementing the strategic plan. (Tr. 33-34.) Temporary faculty cannot serve on the Long Range Planning Advisory Committee. (Tr. 224-25.) As put by the Provost, "strategic planning and budget are primarily the role of the administration." (Tr. 120.)

In addition to the standing committees, the Faculty Handbook establishes numerous advisory committees, including the Academic Service-Learning Faculty Advisory Committee; Experiential Education Advisory Committee; the Institutional Review Board; the Long Range Planning Advisory Committee; Teacher Education Committee; Tenure/Promotion Appeal

Hearing Board; and the University Appeal Board. (Er. Ex. 2, pp. 200-22.) No temporary faculty serves on any of these committees. (Pet. Exs. 3, 5.)

The Academic Council, President, and Provost share the work of the standing committees and other administrative updates with the faculty during several “faculty meetings” each year. (Tr. 54-55.) No attendance is taken at these meetings. (Tr. 236.) There is no record of how many temporary faculty members have ever attended these meetings, though Provost House testified that the number is small. (Tr. 173-74.) Votes are sometimes taken at the meetings. (Tr. 58.) Limited-term and part-time faculty with 18 or more credit-hours are eligible to attend and vote at these meetings. (Tr. 55.) Provost House described the votes are “all-say-aye” type votes where actual vote counts are not determined. (Tr. 58.)

Meetings may also be held at the departmental level. (Tr. 172-73.) Part-time and limited-term may or may not be invited. (Id.) Dr. Bush attended one department meeting and never returned because she felt that she was not welcome as a temporary faculty member. (Tr. 363.) Eisner attended a few department meetings after being hired at Elon but stopped going because she was ineligible to vote on matters. (Tr. 401.)

ARGUMENT

I. The Petitioned-For Faculty Are Not Managerial Employees Because They Are Excluded from Shared Governance and Lack Any Effective Control Over University Decision-Making.

The petitioned-for employees are not managerial employees under *NLRB v. Yeshiva University*, 444 U.S. 672 (1980) (hereinafter “*Yeshiva*”), or its progeny. Elon’s temporary faculty are unquestionably excluded from its system of shared governance. With a single exception, there are no temporary faculty on any of the university-wide or school-wide committees discussed in the record. Temporary faculty are prohibited from serving on all of the

standing committees that conduct the work of shared governance. And they are prohibited from serving on all but one of the Academic Council's 19 seats. They are even excluded from the definition of "faculty" in Elon's governing documents.

The record has been fully developed and unequivocally shows that the petitioned-for faculty do not exercise any control over the five key areas of university decision-making. Because the petitioned-for faculty are excluded from Elon's system of shared governance, they are plainly not managerial employees. Therefore, even if the Board elects to reconsider or revise the "majority status rule," there is no reason to remand the case to the Region. Instead, the Union's certification of representation should be affirmed.

A. Managerial Employees Must Represent Management Interests by Effectively Controlling or Implementing Employer Policy.

Two Supreme Court cases are instructive in determining the managerial status of faculty employees. First, in *NLRB v. Bell Aerospace Co. Division of Textron Inc.*, 416 U.S. 267 (1974), the Supreme Court held that, although managers were not statutorily excluded from the Act, they were nonetheless exempted from its protections. *Id.* at 284. The Court reasoned that Congress "regarded [managers] as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Id.* at 283.

Under *Bell Aerospace*, a party asserting managerial status has the burden of demonstrating that the employees in question "formulate and effectuate management policies by expressing and making operative the decisions of their employer." *Id.* at 285, 288. The managerial exemption is based on the "bedrock principle . . . that employers deserve the loyalty of employees who exercise discretionary authority over central employer policies." *University of Southern California*, 918 F.3d 126, 136 (D.C. Cir. 2019) (hereinafter "*USC*").

Second, in *NLRB v. Yeshiva University*, the Supreme Court articulated a standard for evaluating when faculty were managerial employees. *Yeshiva*, 444 U.S. at 674-75. In *Yeshiva*, the Court was tasked with evaluating whether a bargaining unit composed of the university's full-time faculty, including tenured and tenure-track faculty, was appropriate. *Id.* The Court found the faculty at issue "in effect, substantially and pervasively operat[e] the enterprise." *Id.* at 692 (internal quotations omitted). Elaborating, the Court explained that the faculty decided "what courses will be offered and when they will be scheduled, and to whom they may be taught . . . teaching methods, grading policies, and matriculations standards . . . which students will be admitted, retained, and graduated . . . the size of the student body, the tuition to be charged, and the location of a school." *Id.* at 679, 686, 689. Indeed, the Court noted, "[f]aculty power at Yeshiva's schools extends beyond strictly academic concerns" and "the overwhelming majority of faculty recommendations are implemented." *Id.* at 677. In light of these facts, the Court found that "the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." *Id.* at 686.

"With the Yeshiva faculty's 'absolute' academic authority as a backdrop, the Court explained to the Board . . . how to identify managerial faculty in future university cases." *USC*, 918 F.3d at 129. Faculty may be deemed managerial where they exercise "effective recommendation or control" over central policies concerning "within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served." *Yeshiva*, 444 U.S. at 686.

Importantly, the Supreme Court in *Yeshiva* recognized that not all faculty are managerial employees. To avoid "sweep[ing] all professionals outside the [NLRA] in derogation of Congress' expressed intent to protect them," the Court held that faculty are protected by the

NLRA if their “decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned.” *Id.* at 690. “Further cabin[ing] its holding, the Court recognized that faculties are heterogeneous, and that non-managerial subsets may exist within a faculty entrusted with managerial authority. For instance, the Board might draw a ‘rational line’ between ‘tenured and untenured faculty members.’” *USC*, 918 F.3d at 129 (quoting *Yeshiva*, 444 U.S. at 690 n.31.).

After decades of applying *Yeshiva* using a “totality of the circumstances” approach, the Board set forth an analytical framework for evaluating whether faculty are managerial in *Pacific Lutheran University*, 361 NLRB 1404 (2014) (hereinafter “*Pacific Lutheran*”). Under *Pacific Lutheran*, a party claiming managerial status must prove that the faculty in question exercise “effective recommendation or control” over five main areas of university decision-making: academic programs, enrollment management, finances, academic policy, and personnel policy. *Id.* at 1420. The first three areas are considered “primary” and accorded more weight than the latter two because they “affect the university as a whole.” *Id.* “[T]o be ‘effective’ recommendations must almost always be followed by the administration. . . [and] faculty recommendations are ‘effective’ if they become routinely operative without independent review by the administration.” *Pacific Lutheran*, 361 NLRB at 1421.

Applying this standard, the Board in *Pacific Lutheran* unanimously found that the petitioned-for, full-time, non-tenure-track faculty were not managerial. *See id.* at 1429 (“I agree with my colleagues that the record fails to support a finding that the contingent faculty members are exempt managerial employees.”) (Member Johnson, dissenting); *Id.* at 1444 (“I would ultimately reach the same conclusion: that the full-time contingent faculty here do not have managerial authority.”) (Member Miscimarra, dissenting). Dissenting Board members Phillip

Miscimarra and Harry Johnson “generally agree[d]” with the Board’s “admirable effort” in developing a workable standard. *Id.* at 1429-30 (Miscimarra, Member, concurring in part and dissenting in part); *see also id.* at 1141-42 (Johnson, Member, dissenting).

B. The D.C. Circuit Broadly Endorsed the *Pacific Lutheran* Standard but Rejected the Use of a “Majority Status Rule” in *USC*.

On March 12, 2019, the day of the Elon vote count, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision in *University of Southern California*, 918 F.3d 126 (D.C. Cir. 2019) (“*USC*”). In *USC*, the D.C. Circuit reviewed the *Pacific Lutheran* standard for the first time and broadly endorsed it as consistent with *Yeshiva*.

As the court explained, the *Pacific Lutheran* standard “provides detailed standards for effective control, five precisely articulated decision-making areas, a list of the relevant factors within each area, and a prioritization of the areas.” *USC*, 918 F.3d at 141. Rejecting *USC*’s arguments, the court further held that the *Pacific Lutheran* standard need not specify “exactly how many of the five decision-making areas over which faculty must exercise control in order to qualify as managerial” because “managerial status determinations do not lend themselves to ex ante line drawing or a mathematical exercise in box checking.” *Id.* at 141-42 (quotation marks and alterations omitted). The court also agreed “with the Board that setting a high bar for effective control is necessary to avoid interpreting the managerial exception so broadly that it chips away at the NLRA’s protections.” *Id.* at 140. It recognized that “[a]lthough the Court in *Yeshiva* emphasized the value of faculty collegiality, there may well be issues on which the interests of the [petitioning faculty] and the faculty as a whole differ so significantly that they cannot be reconciled even through collegial compromise.” *Id.* at 138.

Although the court broadly endorsed the *Pacific Lutheran* standard, it disagreed with the interpretation of *Pacific Lutheran* applied by the Regional Director, and affirmed by the Board, in *USC*. It held that the Regional Director improperly “extend[ed]” a principle “hinted” at in a footnote of *Pacific Lutheran* when holding that “a faculty subgroup seeking recognition exercises effective control over a decision-making area through its participation on a committee only when that subgroup constitutes a majority of the committee.” *Id.* at 127, 132, 135; *see also Pacific Lutheran*, 361 NLRB at 1421 n. 36. The D.C. Circuit characterized this extension of *Pacific Lutheran* as the “majority status rule.” *Id.*

Although the court rejected the “majority status rule” applied in *USC*, the court clarified that “whether an individual subgroup possesses a majority of committee seats is not always irrelevant. Quite to the contrary, determining whether a subgroup holds a decisive bloc of committee seats may be necessary where a subgroup’s interest fundamentally diverge from those of the majority.” *Id.* at 138. The court contemplated, for example, that “if a subgroup that the university expects to participate in a committee nonetheless fails to do so, this may signal the presence of structural barriers to that group’s participation.” *Id.* And that, in the case of *USC*, the “Board may be correct that there is something about the status of non-tenure-track faculty, especially part-time non-tenure-track, that effectively silences any managerial ‘voice,’ that such faculty otherwise might possess.” *Id.* at 139 (internal citation omitted).

The court held that instead of relying on the “majority status rule” to determine managerial status, “the question the Board must ask . . . [is] a broader, structural one: has the university included the subgroup in a faculty body vested with managerial responsibilities?” *Id.* at 137. “To answer this question, the Board must, as required by *Yeshiva* examine how the faculty is ‘structured’ and ‘operates,’ as well as the duties employees have been ‘assigned.’” *Id.*

at 137-38. “For example, as in *Yeshiva*, does the university ‘require’ faculty members to participate in committees?” *Id.* Or, is it “unnecessary for the Board to consider whether a managerial faculty body exists because, even assuming one did, the petitioning subgroup is so clearly not included in it—because for example, university rules prohibit its participation in committees[?]” *Id.* at 139.

The court’s last hypothetical situation is precisely the case here. In this case, other than one person on the 19-member Academic Council, the petitioned-for faculty are completely excluded from shared governance. They do not sit on any school or university committees. They are expressly prohibited from sitting on the university’s standing committees. And even if they could sit on those committees, the limited duration of their contracts makes it practically impossible for them to do so. Because the faculty are “so clearly not included” in Elon’s faculty governance, and because “university rules prohibit [their] participation in committees,” they are plainly not managerial. *Id.*

C. The Petitioned-For Faculty Are Excluded from Having Any Effective Control Over University Decision-Making.

Should the Board decide to adopt *USC*, the applicable standard is what was articulated in *Pacific Lutheran* without the extension of a “majority status rule.” In other words, the Board must evaluate whether the faculty at issue exercise actual and effective control over university decision-making in three primary areas—academic programs, enrollment, and finances—and two secondary areas—academic policy, and personnel policy. Typically, the Board evaluates whether this authority exists in shared governance bodies. However, it may be “unnecessary for the Board to consider whether a managerial faculty body exists” where “the petitioning subgroup

[of faculty] is so clearly not included in it—because for example, university rules prohibit its participation in committees.” *Id.* at 139.

The undisputed evidence in the record shows that petitioned-for faculty do not control any of the central policies of Elon, let alone exercise effective control over any of the five policy areas identified by *Pacific Lutheran*. Whether viewed through the lens of *Yeshiva*, *Pacific Lutheran*, *USC*, or any rational interpretation of the “managerial exception,” the petitioned-for faculty at Elon are not managerial employees. An evaluation of the five decision making areas in *Pacific Lutheran*, which were endorsed by the D.C. Circuit in *USC*, only underscores the extent to which the petitioned-for faculty lack any input in governance of the university.

1. Petitioned-For Faculty Have No Control Over Academic Programs.

Decision-making in academic programs concern the university’s “curricular, research, major, minor, and certificate offerings.” *Pacific Lutheran*, 361 NLRB at 1420; *see also Yeshiva*, 444 U.S. at 676 (noting that the faculty “effectively determine[d] . . . curriculum), *USC*, 918 F.3d at 141 (endorsing the five areas of decision-making identified in *Pacific Lutheran*). These “topic areas affect the very nature of an academic institution, reflect its goals and aspirations, and clearly fall outside the routine discharge of a professor’s duties.” *Pacific Lutheran*, 361 NLRB at 1420. Changes in academic programming must be significant enough to “affect and necessitate a change to the university’s organization and structure, such as the creation of a new department.” *Id.*

At Elon, petitioned-for faculty do not play any role in decisions regarding academic programming at the school or university level. For example, they are completely excluded from the process for approving new majors and minors. A school curriculum committee is typically tasked with developing a curriculum for a new major. (Tr. 76-78, 219-20, 237-38.) The

curriculum proposal is then presented to the University Curriculum Committee for approval.

(Id.) No petitioned-for faculty serve on any of the school curriculum committees and temporary faculty are explicitly precluded from serving on the University Curriculum Committee. (Tr. 219-20; Pet. Ex. 3, pp. 8-11; Pet. Ex. 5.)

After receiving approval from the University Curriculum Committee, a curriculum proposal is sent to the Academic Council for review. (Tr. 78; Er. Ex. 8.) According to the Provost, the Academic Council is not required to vote on the curriculum proposal. (Tr. 238.) The proposal is then presented at a faculty meeting, and the faculty may or may not vote on the proposal. (Id.) Elon did not proffer any examples of majors that were voted on by members of the Academic Council or by the full faculty. (Tr. 239.) The only example described in detail was the adoption of a new engineering major by the University Curriculum Committee, which did not require a vote by the Academic Council or the faculty. (Tr. 237-39.)

Therefore, there is absolutely no evidence in the record of any petitioned-for faculty member playing any part in Elon's decision-making about its academic programs. Instead, they are excluded from the committees that are involved in such decisions.

2. Petitioned-For Faculty Have No Control Over Enrollment.

In assessing managerial authority, the Board also looks at whether faculty have authority concerning "enrollment management policies" including the size and scope of the incoming class. *Pacific Lutheran*, 361 NLRB at 1420; *see also Yeshiva*, 444 U.S. at 686 (faculty have "determined the size of the student body."). Provost House testified that the Budget Committee, which he is charged with leading, sets the size of the incoming class. (Tr. 124.) The Budget Committee is composed of four administrators and two fully tenured faculty. (Tr. 122.)

Petitioned-for faculty cannot serve on the Budget Committee. (Id.) Thus, petitioned-for faculty have no role in determining the size of the incoming class.

Provost House also briefly described the University Admissions Committee, which recommends standards for student admissions. (Tr. 89.) Provost House described the Admissions Committee as “not too active” because admissions is largely handled by administrators and staff. (Tr. 96.) Regardless, the Admissions Committee is composed of three administrators and four faculty, none of whom are petitioned-for faculty. (Er. Ex. 2, p. 180, Tr. 90, 220-21.) The record therefore shows the petitioned-for faculty are also completely excluded from this area of decision-making.

3. Petitioned-For Faculty Have No Control Over Finances.

“The power to control or make effective recommendations regarding financial decisions – both income and expenditures – is one of the hallmarks of managerial control across all industries.” *Pacific Lutheran*, 361 NLRB at 1420. To be indicative of managerial status, decisions in this area must have “broad effects across a university,” such as the setting of “net tuition[.]” *Id.*; see also *Yeshiva*, 444 U.S. at 686 (faculty determined “the tuition to be charged.”).

Provost House testified that finances are completely within the administration’s purview and described the Budget Committee’s role in that process. (Tr. 120.) The Budget Committee receives requests from all academic units and non-academic units at Elon, including athletics and university advancement. (Tr. 122.) The President of Elon provides the Committee with certain guidelines that the Committee must operate within. (Tr. 122-23.) The Committee comes up with a budget proposal to distribute revenue within the President’s guidelines. (Id.) This proposal is then discussed at a “budget forum” meeting for faculty feedback. (Tr. 123-24.) Elon did not

provide any information regarding who attends the budget forum or whether any feedback is accepted. After the budget forum, the budget proposal is presented to the President and Board of Trustees for approval. (Id.)

The Budget Committee is composed of the Provost, Chief Financial Officer, Vice President for Business, Finance, and Technology, a dean, and two fully tenured faculty. (Tr. 122.) Petitioned-for faculty cannot serve on the Budget Committee. (Tr. 33, 122.) The record therefore shows the petitioned-for faculty are also completely excluded from this area of decision-making.

4. Petitioned-For Faculty Have No Control Over Academic Policy.

Under *Pacific Lutheran*, the Board considers whether faculty exercise control over academic policy decisions regarding “teaching/research methods, grading policy, academic integrity policy, syllabus policy, research policy, and course content policy.” *Pacific Lutheran*, 361 NLRB at 1420. These determinations must “apply more broadly than the faculty’s classroom[.]” *Id.*; *see also Yeshiva*, 444 U.S. at 686 (faculty “determine teaching methods, grading policies, and matriculation standards”); *but see id.* at 690 (“employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage[.]”).

Academic policy is contained in Elon’s Faculty Handbook, changes to which are approved by the Academic Council and reported to the full faculty. (Tr. 91-92.) Elon has a number of committees that apparently relate to academic policy, such as the Academic Standing Committee, University Curriculum Committee, school-level curriculum committees, Faculty Research and Development Committee, Elon Core Curriculum Council, Global Education Curriculum Committee, Graduate Council, Academic Service-Learning Faculty Advisory

Committee, and Experiential Education Advisory Committee. (Tr. 98, 101, 103; Ex. Ex. 2, pp. 31-45, 200-22.) No petitioned-for faculty serve on these committees. (Pet. Exs. 3, 5.) Temporary faculty are expressly precluded from serving on these committees. (Tr. 98, 103; Er. Ex. 2, p. 117-21; Pet. Ex. 4.) Therefore, the petitioned-for faculty are excluded from this area of decision-making.

Elon's only specific evidence regarding a decision in academic policy concerns the mid-semester grading policy. Provost House testified that some faculty expressed concern around the impracticability of administering mid-semester grades to students. (Tr. 69-70.) The Academic Council subsequently appointed a committee charged with examining the problem and issuing a proposal. (Id.) The makeup of that committee is unknown; there is no evidence it included any petitioned-for faculty. The committee proposed that, in lieu of grades, faculty should only administer mid-semester "assessments." (Id.) The proposal on mid-semester assessments was brought to the Academic Council for discussion, and was approved with a few "friendly amendments." (Id.; Er. Ex. 3.) Minutes from the Academic Council discussion regarding the proposal did not show any participation by the part-time member. (Tr. 236; Er. Ex. 3.) The policy change on mid-semester grading was conveyed at a faculty meeting, but faculty did not vote on the change. (Tr. 236-37.) Therefore, Elon's sole attempt to introduce evidence regarding this area of decision-making did nothing more than underscore the exclusion of petitioned-for faculty.

5. Petitioned-For Faculty Have No Control Over Personnel Policy.

In determining managerial status, the Board also evaluates faculty control over personnel policy and decisions, "including hiring, promotion, tenure, leave, and dismissal." *Pacific Lutheran*, 361 NLRB at 1420; *see also Yeshiva*, 444 U.S. at 686.

Elon proffered evidence regarding the Promotion and Tenure Review Committee, on which petitioned-for faculty are not permitted to serve. (Tr. 92-93; Er. Ex. 2, pp. 44-45.) The Tenure/Promotion Appeal Hearing Board is similarly limited to tenured faculty, precluding participation by the petitioned-for faculty. (Er. Ex. 2, p. 218.) Provost House also testified about the Post-Probationary Review Committee, which was developed to enhance opportunities and support for post-probationary faculty including sabbaticals. (Tr. 94.) This committee is composed of seven faculty, five of which must have rank of professor, and two of which must be either senior lecturers or associate professors; petitioned-for faculty are excluded. (Er. Ex. 2, pp. 43-44.) Because petitioned-for faculty are barred from serving on these committee, they are excluded from all decision-making regarding personnel policy.

6. The Single Adjunct Member of the Academic Council Does Not Transform All Temporary Faculty into Managerial Employees.

Elon's managerial claim appears to rest on the presence of a single part-time faculty member on the 19-member Academic Council, even though there are no petitioned-for faculty on any of the standing committees that perform all of the work of shared governance. But even if a single adjunct member on a single academic committee was somehow relevant, there is not even any evidence of the part-time member engaging in deliberations or exercising any decision-making authority within the Academic Council. Moreover, a single part-time member cannot wield any effective authority among 18 permanent faculty, especially when all of the substantive decisions are made by standing committees on which temporary faculty are explicitly prohibited from serving.

Elon also contends that the petitioned-for faculty exercise managerial authority because limited-term faculty and adjuncts teaching 18 credit-hours or more are eligible to vote at faculty

meetings. Not so. Participating in *pro forma* votes among hundreds of other faculty at meetings that do not require attendance is hardly evidence of managerial status. And even if it was, Elon failed to put forward any evidence of a single petitioned-for faculty ever voting in one of those meetings. See *Pacific Lutheran*, 361 NLRB at 1428 (rejecting the relevance of contingent faculty participation in faculty meetings that were simply “a conduit to transmit previously agreed-upon recommendations to the administration”); see also *id.* at 1444 (“Although contingent faculty have the right to vote in the faculty assembly, PLU did not provide specific evidence showing that any of those faculty members has actually ever voted or even spoken in the faculty assembly.”) (Johnson, Member, dissenting). Thus, the ARD correctly determined the petitioned-for faculty are non-managerial.

CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Board affirm the Union’s certification of representation.

Respectfully submitted, this the 27th day of April, 2020.

/s/ Narendra K. Ghosh
Narendra K. Ghosh
Trisha S. Pande
PATTERSON HARKAVY LLP
100 Europa Dr., Ste. 420
Chapel Hill, NC 27517
(919) 942-5200
nghosh@pathlaw.com
tpande@pathlaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed electronically via the National Labor Relations Board's e-filing service, and was served on counsel for the Employer via e-mail to the following:

Robert O. Sands
robert.sands@ogletree.com

Dated: April 27, 2020.

/s/ Narendra K. Ghosh
Narendra K. Ghosh
nghosh@pathlaw.com
PATTERSON HARKAVY LLP
100 Europa Dr., Ste. 420
Chapel Hill, NC 27517
(919) 942-5200